JUL 2 2001

(6)

Supreme Court, U.S.
FILED
JUL 2 2001
OFFICE OF THE CLERK

No. 00-1250

IN THE

Supreme Court of the United States

US AIRWAYS, INC.,
Petitioner,

v.

ROBERT BARNETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Americans with Disabilities Act requires an employer to reassign a disabled employee to a position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide and established seniority system.

CORPORATE DISCLOSURE STATEMENT

Petitioner US Airways, Inc., is a wholly owned subsidiary of US Airways Group, Inc., a publicly held company.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Ninth Circuit is reported at 228 F.3d 1105 and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The opinion of the panel of the Ninth Circuit is reported at 196 F.3d 979 and is reprinted at Pet. App. 41a. The opinions of the District Court for the Northern District of California are unreported and are reprinted at Pet. App. 79a.

JURISDICTION

The court of appeals entered its judgment on October 4, 2000. The petition for a writ of certiorari was filed on February 1, 2001, and was granted, limited to Question 1, on

April 16, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act is codified at 42 U.S.C. §§ 12101 *et. seq.*, and pertinent provisions are reprinted at Pet. App. 111a.

STATEMENT OF THE CASE

1. *Statutory Framework.* The Americans with Disabilities Act ("ADA"), aims "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). This case involves Title I of the ADA, 42 U.S.C. §§ 12111 *et. seq.*, which addresses discrimination in employment. The general rule in Title I states that "[n]o covered entity" – including an "employer," 42 U.S.C. § 12111(2) – "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . [the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The question in this case is whether an employer unlawfully "discriminates" against a disabled employee within the meaning of Title I by refusing his reassignment request for a reason completely unrelated to his disability, *viz.*, his lack of seniority with the company and the resulting entitlement of another, more senior employee to hold the desired position under the terms of a longstanding company seniority policy.

Title I enumerates several categories of prohibited "discrimination," one of which is especially pertinent here: "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would

impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A). The central issues under that provision are whether the individual is "qualified," whether the accommodation is "reasonable," and whether providing the accommodation would entail an "undue hardship."

As to the first of those, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires." *Id.* § 12111(8).

"Reasonable accommodation," in turn, while not specifically defined in the statute, is described as follows:

> The term 'reasonable accommodation' may include –
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9).

Finally, "undue hardship" "means an action requiring significant difficulty or expense, when considered in light of" several enumerated factors. *Id.* § 12111(10)(A). Those factors are:

> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility

or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12111(10)(B).

2. *Factual Background.* Respondent Robert Barnett was employed by petitioner US Airways, Inc. ("US Airways") and its predecessor for ten years as a customer service agent. Pet. App. 2a. He injured his back in 1990 while working in a cargo position. Pet. App. 50a. Because he could no longer perform the physical requirements of handling cargo, he sought to transfer to another position by taking advantage of his seniority rights under the company's seniority policy. *Id.*

US Airways' seniority policy has been in place for decades, and it governs over 14,000 customer service agents. Pet. App. 96a. Under the terms of the policy, an employee's level of seniority determines his rights concerning a number of important issues, including the order of furloughs and recalls, displacements, bidding for shifts and days off, filling of vacancies, and requests for position transfers. App. 24-27. Respondent used his seniority to transfer into a position in the mailroom, the functions of which were within his physical capabilities. Pet. App. 2a. He held the position for two

years. Pet. App. 80a.

US Airways suffered significant financial losses in 1992, ultimately resulting in the layoffs of over 7,000 employees. App. 21. In connection with the layoffs, all of the company's cargo and mailroom position came open for bidding in August 1992. Pet. App. 50a. Respondent became aware that employees with greater seniority planned to exercise their rights to transfer into the position in the mailroom. *Id.* In response, he requested that the company, as an accommodation under the ADA, make an exception to its seniority rules and allow him to hold the mailroom position notwithstanding the seniority rights of the other employees to the position. *Id.*

US Airways created an extra (and temporary) "limited duty" position in the mailroom for respondent while assessing his situation. Pet. App. 50a-51a. While limited duty positions usually expire after sixty days, the company permitted respondent to remain in the limited duty position for five months. Pet. App. 51a. Then, in January 1993, his supervisors informed him that they could no longer maintain the extra, limited duty position. *Id.* Because respondent had insufficient seniority for a regular position in the mailroom and because his back condition prevented him from performing the duties of the cargo position available to him under the seniority policy, he was placed on job injury leave. *Id.* The company decided not to override the seniority policy because doing so would deprive his coworkers of their legitimate right to hold a position in the mailroom, would trigger a ripple effect displacing the settled status of a number of additional employees, and would involve the company in a sensitive and subjective balancing of competing claims among its employees. *See* App. 22.

3. *Proceedings Below.* Respondent filed suit alleging that US Airways violated the ADA's "reasonable accommodation" requirement by not making an exception to its sen-

iority policy to permit him to hold a position in the mail-room.[1]

a. The district court granted summary judgment in favor of US Airways, concluding that modification of the seniority system was not a "reasonable accommodation" under the ADA. Pet. App. 97a. Such modifications, the court determined, "could create significant disruptions in the seniority policy." *Id.*

b. A panel of the Ninth Circuit affirmed. Pet. App. 41a. The panel was persuaded by "well-reasoned opinions from other circuits that have concluded that the ADA does not require an employer to give disabled employees preference over non-disabled employees in hiring and reassignment decisions." Pet. App. 59a. In the panel's view, the ADA requires "equality among disabled and nondisabled employees in hiring and reassignment decisions," not "discriminat[ion] against persons free from disability." Pet. App. 60a (internal quotation marks omitted).

c. The *en banc* Ninth Circuit reversed. According to the *en banc* court, "reassignment is a reasonable accommodation to which disabled employees should have priority over non-disabled employees," Pet. App. 21a, and the existence of a seniority system does not affect that conclusion, Pet. App. 27a. As a result, the court determined, an employer should have the burden of showing in a "case-by-case fact intensive analysis" that a "particular reassignment" in violation of a seniority policy "would constitute an undue hardship." *Id.*

SUMMARY OF ARGUMENT

I. At the core of this case lies a basic dispute about the nature of the ADA's "reasonable accommodation" requirement: whether it calls for measures enabling disabled em-

[1] Respondent also raised a number of other claims under the ADA and under state law, none of which are in issue here.

ployees to compete on an equal basis with non-disabled employees in the workplace; or whether it goes further, requiring that disabled employees be given preference over non-disabled employees in employment decisions. Congress supplied the answer in the ADA's statutory findings, which state that the discrimination addressed by the Act "denies people with disabilities the opportunity to *compete on an equal basis*." 42 U.S.C. § 12101(a)(9) (emphasis added). The terms of the statute, the administrative regulations, and the legislative history are in accord, confirming that the ADA aims to remove barriers to equal employment opportunity faced by disabled individuals but not to require that disabled individuals otherwise be given preferential treatment. That understanding informs the resolution of this case.

II. Under the ADA's reasonable accommodation standard, employers are required to make "reasonable accommodations" to the limitations of a disabled individual unless the employer "can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). The threshold question under that standard is whether the particular accommodation at issue is a "reasonable" one.

A. Contrary to respondent's submission, a "reasonable" accommodation does not merely mean an "effective" accommodation, a reading that would make little sense given that the term "accommodation" already assumes effectiveness. Instead, consistent with the meaning of the term "reasonable" throughout the law, a "reasonable" accommodation is one that is objectively warranted in the circumstances. For two basic reasons, the waiver of seniority rules sought by respondent here does not qualify as a "reasonable" accommodation under the ADA.

B. First, awarding respondent an exception from the seniority policy would amount to granting him preferential treatment rather than enabling him to compete on an equal basis. The reason respondent was denied a position in the

mailroom – his relative lack of seniority in the company – does not arise from his disability or from any work-related limitations caused by his disability. Waiver of seniority rules thus would not alleviate a performance-related obstacle that is associated with his disability. As the EEOC regulations explain, the waiver would not "enable" him "to perform the essential functions" of the mailroom position, 29 C.F.R. § 1630.2(o)(1)(ii), but is designed instead to enable him to obtain the position in the first place. Nor would the waiver "enable" him to "enjoy equal benefits and privileges of employment," *id.* § 1630.2(o)(1)(iii), as he seeks an exception from established rules that all other employees must face – rules entirely unrelated to the removal of a disability-related obstacle. The waiver of the seniority policy, in short, would not be an accommodation to his disability; it instead would be an accommodation to his lack of seniority, which is independent from (and unconnected to) his disability.

The fact that the statute specifically identifies reassignment as a possible form of accommodation does not change the analysis. That reference, contrary to the view of the Ninth Circuit below, does not mean that disabled individuals must be given priority in reassignment. Instead, as Judge Posner explained in *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), employers must consider a disabled employee for reassignment and enable him to compete for reassignment on an equal basis, but need not select the disabled employee for reassignment if legitimate and neutral considerations favor a different employee. An interpretation requiring employers to give preference to disabled employees in reassignment decisions would go well beyond the basic non-discrimination objectives of the ADA.

C. Even if disabled employees are entitled to preferential treatment in reassignment as a general matter, that rule could not apply in the particular context of a seniority policy. Seniority rules engender legitimate and settled expectations in

employees, and courts have not required employers to interfere with those expectations when facing analogous claims under parallel reasonable accommodation standards. In respect to Title VII's reasonable accommodation standard, for instance, this Court ruled in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), that an employer was not required to make an exception to seniority rules that determined shift assignments in order to accommodate an employee's religious observance. Likewise, prior to the ADA's enactment, courts interpreting the reasonable accommodation standard in the regulations implementing the Rehabilitation Act uniformly found that employers need not reassign a disabled individual in violation of a seniority system.

When "judicial interpretations have settled the meaning of an existing statutory provision" in that manner, "repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). The ADA's reasonable accommodation requirement thus must be interpreted consistently with the parallel standards under Title VII and the Rehabilitation Act, confirming that the ADA likewise does not require an employer to make a reassignment in violation of an established seniority policy. That conclusion is reinforced by Congress's specification in the statute that reassignment need not be considered unless it is to a "vacant position," 42 U.S.C. § 12111(9)(B), as a position reserved for a more senior employee is not "vacant" to a junior employee. The fact that the prior decisions under Title VII and the Rehabilitation Act involved collectively bargained seniority policies is irrelevant, because the ADA makes clear that its provisions apply equally to collectively bargained and employer implemented policies.

III. Finally, even if, as respondent believes, a "reasonable accommodation" is merely an "effective accommodation," he still would not prevail. Under that view, the burden

would shift to the employer to establish that any "effective accommodation" would impose an "undue hardship" on the operation of the employer's business. The accommodation sought by respondent here would impose an undue hardship, as infringing the legitimate expectations and rights of employees under a longstanding seniority system would entail substantial adverse consequences for workplace relations.

ARGUMENT

"As in all cases of statutory construction," the Court's "task is to interpret the words" of the ADA "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). When the terms of the ADA are interpreted "in light of the purposes Congress sought to serve," the conclusion in this case becomes clear: the statute's "reasonable accommodation" standard does not compel an employer to reassign a disabled employee to a position in place of another employee who is entitled to the position under an established and bona fide seniority policy.

I. THE ADA AIMS TO ENSURE THAT DISABLED PERSONS ENJOY EQUAL EMPLOYMENT OPPORTUNITIES, BUT NOT TO MANDATE THAT THEY BE GIVEN PREFERENTIAL TREATMENT.

As the statutory text, administrative interpretations, and legislative history make apparent, Congress's purpose in enacting Title I of the ADA was to enable disabled individuals to compete equally in the workplace and to enjoy equal employment opportunities and privileges. Congress did not intend to go further than that, however, by requiring employers to accord preferential treatment to disabled employees in employment decisions.

The ADA's congressional findings illuminate that understanding of the statute's purposes. Because those findings

are "included in the ADA's text," they "give[] content to the ADA's terms," *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999), and they "serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned," *Olmstead v. L.C.*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring in judgment); *see Sutton*, 527 U.S. at 484-87 (relying on ADA's findings in interpreting substantive scope of ADA's definition of disability). According to the statutory findings, the "Nation's proper goals regarding individuals with disabilities are to assure *equality of opportunity*, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8) (emphasis added). And the type of discrimination with which Congress was concerned, the statute explains, is discrimination that "denies people with disabilities the opportunity to *compete on an equal basis* and to pursue those opportunities for which our free society is justifiably famous." *Id.* § 12101(a)(9) (emphasis added).[2]

The "reasonable accommodation" requirement plays a central role in enabling disabled persons to "compete on an equal basis" in employment. Congress understood when enacting the ADA that discrimination against the disabled can

[2] The pertinent administrative materials reaffirm Congress's emphasis on enabling disabled persons to "compete on an equal basis" in employment matters. The EEOC regulations implementing Title I of the ADA succinctly describe the purpose of the statute as "requiring equal employment opportunities for qualified individuals with disabilities." 29 C.F.R. § 1630.1(a). The EEOC also issued an "Interpretive Guidance" in conjunction with – and as an appendix to – the regulations, which likewise characterizes the purpose of the ADA as "requir[ing] that individuals with disabilities be given the *same consideration* for employment that individuals without disabilities are given." 29 C.F.R. pt. 1630 app. § 1630.1(a) (emphasis added); *see id.* pt. 1630 app. Bkgrd. (ADS is "designed to remove barriers which prevent qualified individuals with disabilities from enjoying the *same* employment opportunities that are available to persons without disabilities) (emphasis added).

take several forms. *See* 42 U.S.C. § 12101(a)(5). Like other employment discrimination laws, Title I of the ADA addresses both intentional discrimination (*i.e.*, disparate treatment) and the use of tests and selection criteria that disproportionately screen out the disabled (*i.e.*, disparate impact). *See id.* §§ 12112(b)(1), (6). But, as Congress recognized, disabled persons frequently encounter a more subtle form of disadvantage in the workplace: insensitivity or indifference to the extent to which the physical arrangement of employment facilities, the use of standard working equipment, or the application of general employment policies and procedures can constrain the ability of disabled individuals to perform their jobs effectively and thereby prevent their equal enjoyment of employment privileges. *See id.* § 12101(a)(5); *Board of Trustees of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 968 (2001) (Kennedy, J., concurring) ("There can be little doubt . . . that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.").[3]

The reasonable accommodation requirement is designed to address those sorts of obstacles to equal employment opportunities. *See Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1985) ("reasonable accommodation" under the Rehabilitation Act "relates to the elimination of existing obstacles against the handicapped"). The statute does not define "reasonable accommodation," but provides several examples of measures that might qualify as a reasonable accommodation in particular circumstances. *See* 42 U.S.C. § 12111(9). Each contemplates an adjustment in existing operations designed to alleviate the effect of an employee's disability on job performance and employment opportunities. The adjustment

[3] *See also* H.R. Rep. No. 101-485 (II), at 29 (1990) ("Discrimination also includes harms resulting from . . . adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference – that discrimination resulting from benign neglect.").

might take the form of changing the physical arrangements in the workplace, providing new or modified work equipment, altering job responsibilities, permitting a modified work schedule, or, as are especially relevant in this case, amending employment policies or reassigning an employee to a different position. *See id.*

The ADA thus asks more of employers than to desist from intentional discrimination and to suspend the use of tests and selection criteria that disproportionately disadvantage the disabled. Under the reasonable accommodation standard, employers also must take certain affirmative measures on behalf of disabled individuals to enable them to compete on an equal basis in the workplace. But there is an important distinction between requiring affirmative steps to ameliorate the consequences of a disability on job performance and requiring the establishment of preferences for disabled employees over non-disabled employees. *Cf. Choate,* 469 U.S. at 300 n.20 (referring to "the difference between affirmative action and reasonable accommodation" in respect to the Rehabilitation Act). After all, the "reasonable accommodation requirement is best understood as a means by which barriers to the *equal* employment opportunity of an individual with a disability are removed or alleviated." 29 C.F.R. pt. 1630 app. § 1630.9 (emphasis added).

Congress carefully observed the distinction in the ADA. The statute speaks strictly in terms of affording "people with disabilities the opportunity to compete on an equal basis," 42 U.S.C. § 12101(a)(9), and there is no suggestion in the text of a requirement to give preference to disabled individuals. Congress emphasized the point in the legislative history. Both the House and Senate Reports state unambiguously that "the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability." H.R. Rep. No. 101-485 (II), at 56; S. Rep. No. 101-116, at 26-27 (1989). And the administrative

interpretations of Congress's intent reiterate that understanding. According to the EEOC's Interpretive Guidance, "the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, *or require preferences favoring individuals with disabilities over those without disabilities*." 29 C.F.R. pt. 1630 app. Bkgrd (emphasis added). The terms of the ADA's reasonable accommodation requirement must be construed and applied to the circumstances of this case in recognition of – and consistent with – those basic congressional purposes.

II. THE REASONABLE ACCOMMODATION STANDARD DOES NOT REQUIRE REASSIGNING A DISABLED EMPLOYEE IN VIOLATION OF AN ESTABLISHED SENIORITY POLICY.

The ADA requires an employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer can "demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A). The threshold question under that provision, then, is whether the particular accommodation at issue is a "reasonable" one. The accommodation sought by respondent is not "reasonable," particularly when considered in light of the ADA's basic objectives.

A. The Requested Accommodation Must Be "Reasonable" And Not Merely Effective.

Before turning to an analysis of whether respondent's requested accommodation is "reasonable," it is necessary at the outset to address the nature of respondent's burden in that regard. It is undisputed that the plaintiff bears the burden of demonstrating that an accommodation is reasonable.[4] The

[4] "An ADA plaintiff bears the burden of proving that she is a 'qualified individual with a disability' – that is, a person 'who, with or without reasonable accommodation, can perform the essential functions of her job.'" *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) (quoting 42 U.S.C. § 12111(8)). It follows necessarily that where a disabled individual requires accommodation, he bears the burden to show that the accommodation is "reasonable." *See Feliciano v. Rhode Island.*, 160 F.3d 780, 786 (1st Cir. 1998).

question is what sort of showing that burden entails.

Respondent contended in the proceedings below that he needed only to demonstrate that his requested accommodation would be "effective" in addressing his disability. Under that view, which is expressed in the EEOC's "Enforcement Guidance," *see EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Compliance Manual (CCH), § 902, No. 915.002 (Mar. 1, 1999) ("Enforcement Guidance") 5435, 5437-38, a plaintiff satisfies his entire burden in a reasonable accommodation case simply by showing that the accommodation he seeks would be "effective." Any consideration of the implications of the accommodation for an employer's operations could enter into the analysis only in connection with the employer's effort to establish the "undue hardship" defense. That position would entail profound practical implications in cases of this sort. The prospect of guessing wrong on whether a request to make an exception to a neutral employment policy will be found in litigation to entail an "undue hardship" would lead an employer to accede to the request in virtually every instance.

Respondent's (and the EEOC's) reading of the statute has not been accepted by a single court of appeals, *see Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 & n.4 (1st Cir. 2001), and for understandable reasons.[5] To begin with, it

[5] The EEOC's Enforcement Guidance is not entitled to *Chevron* deference. As the Court recently explained, "'interpretations contained in policy statements, agency manuals and *enforcement guidelines*'" are "beyond the *Chevron* pale." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2167 (2001) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587

cannot account for the critical term "reasonable" in "reasonable accommodation." *See Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (per Posner, J.). If respondent means to suggest that "reasonable" simply means "effective," that explanation founders on the recognition that the word modified by "reasonable" – *i.e.*, "accommodation" – presupposes effectiveness: an accommodation that is not effective "would not be an accommodation of the disability at all." *Id.* at 542. If respondent means to suggest, alternatively, that a "reasonable accommodation" is one that at least is "reasonably" (in the sense of "moderately") effective, that explanation fares no better: it is undisputed that a host of conceivable accommodations that would be *fully* effective nevertheless do not qualify as "reasonable" accommodations, entirely apart from any questions of undue hardship. *See* 29 C.F.R. pt. 1630 app. § 1630.2(o) (no requirement to reallocate essential functions of job or to promote disabled employee); *id.* pt. 1630 app. § 1630.9 (no requirement to supply prosthetic devices, wheelchairs, or eyeglasses); Enforcement Guidance 5453 (no requirement to create new position). That could only be the case if "reasonable" means something more than "effective" or "moderately effective."

The more straightforward reading of the reasonable accommodation obligation, as several members of the Court observed last Term, is that it "requires an employer to make accommodations that are reasonable." *Board of Trustees of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 974 (2001) (Breyer, J., dissenting). When the standard is properly framed in that manner, the term "reasonable" naturally assumes its ordinary meaning in the law, that of "[f]air, proper," "suitable under

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(2000)) (emphasis added). *See also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69-70 n.6 (1986) ("EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law.").

the circumstances," or "[f]it and appropriate to the end in view." Black's Law Dictionary 1265 (6th ed. 1990); *see* II Webster's Third New Int'l Dictionary 1892 (1986) ("not extreme," "not excessive," "not demanding too much"); XIII Oxford English Dictionary 291 (2d ed. 1989) ("not extravagant or excessive," "[o]f such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose," "[p]roportionate").

The plaintiff thus must establish that the particular accommodation in question is "reasonable" – *i.e.*, "fair," "appropriate" or "suitable" in the circumstances, "proportionate," and "not demanding too much" – a standard that by nature entails at least some objective assessment of the implications of the accommodation for an employer (or for employers generally). *See Vande Zande*, 44 F.3d at 542-43; *Reed*, 244 F.3d at 259 ("consistent with its usage throughout the law, the concept of reasonableness here constrains the plaintiff in what she can demand from the defendant"). If the requested accommodation is determined to be reasonable in that sense, the employer must demonstrate that it nonetheless would impose an undue hardship in view of the company's subjective situation and the particular nature of its business circumstances and operations. *See Vande Zande*, 44 F.3d at 543; *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993).

B. Respondent's Requested Accommodation Is Not Reasonable Because It Seeks Preferential Treatment In Respect To A Requirement Unrelated To His Disability.

As we have seen, the ADA draws an important distinction between requiring employers to take measures that enable disabled employees to compete on an equal basis, on the one hand, and requiring employers to give preference to disabled employees in employment decisions, on the other. Respondent's requested accommodation falls into the latter camp, and thus does not qualify as a reasonable accommoda-

tion under the Act.

1. Waiver of a neutral seniority policy would not alleviate an obstacle to employment opportunity that is related to an employee's disability.

a. Seniority rules like the ones followed by US Airways here represent a "neutral and non-arbitrary method of resolving sensitive questions in the workplace." *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (4th Cir. 2001). One of the principal and recognized advantages of a policy that allocates employment opportunities (and burdens) on length of tenure with the company is its objectivity. *See* George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1602 (1969). Far from itself constituting discrimination, then, enforcement of a seniority policy ordinarily is understood as a means of preventing discrimination. *See id.* And there is no suggestion in this case that US Airways' seniority policy is not bona fide or legitimate, in the sense that, notwithstanding its apparent neutrality, it was adopted (or has been applied) as a pretext for discrimination against the disabled. *See Teamsters v. United States*, 431 U.S. 324, 355-56 (1977). Nor is there any suggestion that the seniority policy, which applies equally to the non-disabled and the disabled, raises a question of disparate impact.

But the ADA also requires employers to make reasonable accommodation, and it is that standard on which respondent relies here. In respondent's view, the reasonable accommodation requirement obligates the company to assign him to a position in the mailroom ahead of others entitled to the position under the company's longstanding seniority policy. The question for the Court is whether respondent's request for special priority status in the assignment of positions fits within the category of reasonable accommodation required by the statute or instead amounts to the sort of mandatory preference that falls outside of the ADA.

Respondent's request falls into the latter category. That conclusion of course does not follow necessarily from the mere fact that respondent seeks an exception to a neutral employment policy. The very nature of the reasonable accommodation requirement is to compel employers to make exceptions to their neutral policies where doing so would remove a disability-related obstacle to the ability of an employee to perform the functions of the job he holds or desires. Indeed, the statute explicitly lists "appropriate adjustment or modifications of examinations, training materials or policies" as a type of accommodation that might be required in certain circumstances. 42 U.S.C. § 12111(9)(B). As but one example, a disabled person who requires periodic doses of medication might be unable to perform his job effectively in the face of a policy that limits the number of breaks that employees may take during the workday; and the employer might be required to allow an exception to the policy in those circumstances (assuming the lack of an "undue hardship").

Here, however, the seniority policy does not present a comparable obstacle. Unlike the need to take additional break time due to a disability, respondent's disability does not disadvantage him under US Airways' seniority policy: his lack of relative seniority with the company does not arise from his disability or from any work-related limitations associated with his disability. Simply put, inadequate seniority is not a consequence of disability. Waiving the seniority policy thus would not alleviate an obstacle related to his disability. The reasonable accommodation standard does not require making an exception to a neutral employment policy in those circumstances – the accommodation would not be to respondent's disability, but to his lack of seniority, which is entirely independent. Where a proposed accommodation is not designed to alleviate an obstacle associated with an employee's disability, it becomes indistinguishable from the sort of naked preference that Congress intended to exclude from the statute's requirements.

b. The EEOC regulations on reasonable accommodation illustrate the point. *See* 42 U.S.C. § 12116 (authorizing EEOC to issue regulations implementing Title I). Those "[r]egulations are an important tool in identifying the kinds of contexts, policies, and practices that raise concerns under the ADA." *Olmstead v. L.C.*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring in judgment). They serve that purpose here, as they confirm that a measure that addresses an obstacle unassociated with an employee's disability cannot constitute a reasonable accommodation.

Unlike the statute, which lists several examples but contains no explanation of "reasonable accommodation," the regulations include a definition:

> The term reasonable accommodation means:
>
> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1).

The "modification or adjustment" of seniority rules sought by respondent here does not fit within any of those categories. The first category deals with initial applicants

and not existing employees; but respondent, in any event, of course was "considered" for the mailroom position, *id.* § 1630.2(o)(1)(i). His complaint is that he was not awarded the position, not that he was not considered for it. The second category reflects the heartland of the accommodation requirement, encompassing modifications designed to overcome disability-related obstacles to job performance. The modification sought by respondent, however, is not designed to "enable" him "to perform the essential functions" of the mailroom position he seeks, *id.* § 1630.2(o)(1)(ii), as his back injury does not impede his ability to carry out those functions. The modification instead is designed to secure him the position in the first place, wholly apart from any effect of his disability on performance of the position's duties.[6] Finally, as to the third category of reasonable accommodation, respondent does not seek "equal" treatment with "other similarly situated employees without disabilities," *id.* § 1630.20(o)(1)(iii); he instead seeks an exemption from the seniority rules that they all must face.

Respondent's request for an override of the seniority policy thus does not fit the criteria of a reasonable accommodation, and instead contemplates the sort of preferential treatment that falls outside the scope of the statute. Of course,

[6] In this sense, respondent essentially seeks a modification of the qualifications for the position, which by definition falls outside the scope of the reasonable accommodation requirement. An employer is only required to make reasonable accommodation for a "*qualified* individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). The regulations define that term as "an individual with a disability who satisfies the requisite skill, *experience*, education and *other job-related requirements* of the employment position such individual holds or desires, and who . . . can perform the essential functions of such position." 29 C.F.R. § 1630.2(m) (emphasis added). Here, a "job-related requirement" of the mailroom position (and all other positions) is that an employee must possess sufficient seniority, *i.e.*, "experience," to obtain the position in the bidding process. Respondent's lack of adequate seniority to obtain the mailroom position means that he is not "qualified" for the position.

respondent's back injury left him unable to perform the physical duties of a cargo position, and the operation of seniority rules typically will limit, and in some cases eliminate, the field of alternative jobs available to (and within the capabilities of) more junior employees. That is particularly so where, as here, the implementation of layoffs leaves employees vying for a diminished number of positions. But the reasonable accommodation standard is intended to alleviate obstacles to equal employment opportunity, not to guarantee employment. *See* 29 C.F.R. pt. 1630 app. § 1630.9 ("reasonable accommodation requirement is best understood as a means by which barriers to . . . equal employment opportunity . . . are removed or alleviated"). After all, it is undisputed that employers need not give preference to disabled job applicants in hiring decisions. It should follow that employers likewise need not give preference to disabled workers when selecting among existing employees.[7]

2. The statutory reference to reassignment as a possible accommodation does not require giving disabled employees priority in reassignment.

The Ninth Circuit ruled below that "disabled employees should have priority over non-disabled employees" in reassignment, Pet. App. 21a, basing that conclusion on the ADA's explicit reference to "reassignment to a vacant position" in the list of potential reasonable accommodations. *See* 42 U.S.C. § 12111(9)(B). That reference, in the court's view, means that a disabled employee must be granted reassignment as a reasonable accommodation as long as he meets

[7] The Interpretive Guidance appended to the regulations reinforces the point. *See* 29 C.F.R. pt. 1630 app. § 1630.9 ("The reasonable accommodation that is required by this part should provide . . . an equal employment opportunity. Equal employment opportunity means an opportunity to attain the *same* level of performance, or to enjoy the *same* . . . *privileges of employment* as are available to the average similarly situated employee without a disability.") (emphasis added).

the minimal qualifications for the position. *See* Pet. App. 22a. The Ninth Circuit relied heavily on the EEOC's Enforcement Guidance, which submits that a disabled employee must be given priority in reassignment when no alternative accommodation can enable him to perform his current job. *See* Enforcement Guidance 5452-53.

a. That reading of the statute is incorrect, and is incompatible with Congress's purposes to promote competition on an equal basis but not require preferential treatment. Nothing in the statutory language concerning reassignment suggests an intention to require giving priority in reassignment to disabled employees over non-disabled employees, including where a disabled employee is unable to perform the duties of his current position. That is evidenced by the fact that the relevant language only contemplates reassignment as a possible accommodation when it is "to a vacant position." 42 U.S.C. § 12111(9)(B). The ADA's emphasis on "vacant" position and the attendant statutory intent not to require "bumping" of an employee, *see Dalton v. Subaru-Isuzu Auto, Inc.*, 141 F.3d 667, 678 (7th Cir. 1998); Enforcement Guidance 5453, demonstrate that Congress did not aim to give disabled employees priority in reassignment, even a disabled employee no longer able to perform his current job. If it were otherwise, Congress presumably would have allowed for bumping at least in some situations, *i.e.*, where it would result in negligible dislocation and no demotion or where the incumbent has held the position only for a very short time.

Nor does the limitation to a "vacant position" in any way suggest an intention on Congress's part to require giving preference to disabled employees in reassignment in all circumstances except only where another employee physically occupies a position. It is undisputed that employers are not required to create a new position for a disabled employee, *see Dalton*, 141 F.3d at 680; Enforcement Guidance 5453, or – more significantly – to promote a disabled employee to an

existing vacant position (even if he meets the qualifications for the position), *see EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000); 29 C.F.R. pt. 1630 app. § 1630.2(o), notwithstanding that neither of those would entail any dislocation of an employee who occupies a position. As a result, the ADA's identification of "reassignment to a vacant position" as a *possible* accommodation cannot be read to mean that employers are *required* to give disabled employees priority in reassignment whenever the position is not physically occupied. Indeed, given that an employer need not promote a disabled employee to a fully vacant position, it should follow that an employer also need not assign a disabled employee to a position reserved for a more senior employee under a longstanding seniority policy.

b. The better understanding of the reassignment language than the one accepted by the Ninth Circuit below, and one more in keeping with the statutory intent to promote equal employment opportunity, is that an employer must consider reassigning a disabled employee to a new position and must enable him to compete for the position on an equal basis, but need not grant him reassignment where neutral and legitimate considerations favor a different employee.

That interpretation was adopted in *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d at 1024, and the analysis in that case is instructive here. There, as here, a disability rendered the plaintiff physically unable to continue in her current job in a warehouse, leading her to request reassignment to a clerical position. *Id.* at 1026. The employer, again as here, refused the reassignment request based on a neutral policy, in that case a policy calling for selection of the most qualified applicant. Just as respondent's disability in this case is not what made him less senior than other employees, in *Humiston-Keeling* the plaintiff's "disability isn't what [made her] unable to perform the job as well as the person who got it." *Id.* at 1027. As in this case, the disability therefore "put her

at no disadvantage in competing for an opening in an office job." *Id.* The EEOC nevertheless took the position that she should have been given the office job because she satisfied the minimal qualifications, notwithstanding the employer's established policy of selecting the very best applicant.

Judge Posner's opinion for the court flatly – and correctly – rejected the EEOC's reasoning, which is precisely analogous to respondent's in this case. In his view, "there is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job" and "requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group." *Id.* at 1028. "That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group." *Id.* at 1029. He therefore found the EEOC's position to go "well beyond" the requirements of the ADA. *Id.* The same necessarily is true of respondent's position in this case. In short, the mere fact of an employee's disability does not entitle him to preferential treatment in reassignment, and so does not require an employer to abandon its neutral and legitimate criteria for allocating positions among existing employees.

c. The Ninth Circuit below based its contrary conclusion on a belief that the ADA's specification of reassignment as a possible accommodation would "'be of little value'" if it did not entitle disabled employees to priority in reassignment. Pet. App. 22a (quoting Enforcement Guidance 5456). That reasoning is without merit, in large part for the reasons explained in *Humiston-Keeling*: if the statute lacked a reassignment provision, "an employer might plausibly claim that 'reasonable accommodation' refers to efforts to enable a disabled worker to do the job for which he was hired or for which he is applying, rather than to offer him another job."

Humiston-Keeling, 227 F.3d at 1027.[8] The reference to reassignment thus "makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance," and "if the reassignment is feasible" and in accordance with the employer's neutral selection criteria, "the reassignment is mandatory." *Id.* The reassignment provision thereby entails an obligation that does not exist in respect to initial job applicants: an employer is not required to consider reassigning an initial applicant who is disabled to alternative job openings within the applicant's qualifications and capabilities. *See* 29 C.F.R. pt. 1630 app. § 1630.2(o).

The reassignment provision is significant in another respect as well. Because the reasonable accommodation requirement applies to "employment position[s] that [an] individual holds *or desires*," 42 U.S.C. § 12111(8) (emphasis added), the reassignment language means that an employer is obligated not just to consider a disabled employee for a

[8] The reasonable accommodation requirement in the regulations implementing § 504 of the Rehabilitation Act, 29 U.S.C. § 794, was susceptible to such a reading prior to the ADA's enactment. Those regulations, like the ADA, enumerated several examples of accommodations that could be reasonable in a particular case. *See* 45 C.F.R. § 84.12(b) (1990). The list did not include reassignment to a vacant position, however. *See id.* Some courts construing those regulations determined that employers need not even consider reassignment as a possible accommodation. *See, e.g., Black v. Frank*, 730 F. Supp. 1087, 1091 (S.D. Ala. 1990); *Fields v. Lyng*, 705 F. Supp. 1134, 1137 (D. Md. 1987); *Wimbley v. Bolger*, 642 F. Supp. 481, 486 (W.D. Tenn. 1986); *Dancy v. Kline*, 639 F. Supp. 1076, 1080 (N.D. Ill. 1986); *Carty v. Carlin*, 623 F. Supp. 1181, 1188 (D. Md. 1985); *Alderson v. Postmaster General*, 598 F. Supp. 49, 55 (W.D. Okla. 1984). Congress left no doubt on that question in the ADA by specifically adding "reassignment to a vacant position" to the list of possible accommodations. Congress amended the Rehabilitation Act after the ADA's enactment to provide that conduct that violates the ADA also constitutes discrimination under § 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794(d).

new position, but to consider his candidacy on the assumption that any reasonable accommodations necessary to enable him to perform that position's functions will have been made. The reassignment provision thereby essentially collapses two levels of reasonable accommodation – the reassignment itself, together with any required accommodation for the employee's disability in the new position. And the employee must be considered for the new position based on his projected performance in it with the benefit of any such accommodation.

Finally, the explicit reference to reassignment helps to address the "indifference" brand of discrimination that Congress specifically sought to address in the Act. *See supra* at 12. In particular, because employers must consider reassignment as an accommodation, an employer typically will have to work with a disabled employee to identify available positions and to determine the employee's ability to perform the responsibilities of (and his degree of interest in) any such positions. The employer is especially well situated to assess whether positions elsewhere in the company might become available in the near future, and can share that information with the employee. An employer aware of the need to consider reassignment as an accommodation by virtue of the explicit statutory language will more likely engage in that sort of constructive effort to locate available positions. Indeed, the statute encourages just that kind of productive dialogue. *See* 42 U.S.C. § 1981a(a)(3) (establishing safe harbor from damages liability in an ADA case where employer has engaged in "good faith efforts" to "identify and make a reasonable accommodation").

For those reasons, "[p]lenty is left" of the reassignment provision even if it does not require giving disabled employees preferential treatment in reassignment decisions. *Humiston-Keeling*, 227 F.3d at 1028. The contrary view of the Ninth Circuit below and of the EEOC Enforcement Guid-

ance thus should be rejected.

The Enforcement Guidance is not entitled to *Chevron* deference. *See supra* at 15 n.5. And to the extent it is "eligible to claim respect according to its persuasiveness," *United States v. Mead Corp.*, 121 S. Ct. 2164, 2168 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), it is not persuasive for the reasons stated. In fact, the Enforcement Guidance appears to conflict with the agency's own Interpretive Guidance, which was issued as an appendix to the regulations. The Interpretive Guidance states unequivocally in describing the purpose of Title I of the ADA that it "does not . . . require preferences favoring individuals with disabilities over those without disabilities." 29 C.F.R. pt. 1630 app. Bkgrd.; *see id.* pt. 1630 app. § 1630.1(a) (purpose of ADA is to "require[] that individuals with disabilities be given the *same* consideration for employment that individuals without disabilities are given") (emphasis added). That interpretation is incompatible with the view expressed in the Enforcement Guidance that disabled employees are entitled to priority over non-disabled employees in reassignment; and the inconsistency further undermines the latter's persuasive force. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

The crux of the matter is this. In the view of the Ninth Circuit below and of the Enforcement Guidance, disabled employees must be given preference in reassignment, and an opportunity to compete for reassignment on an equal basis does not suffice under the statute. Congress, however, specifically indicated in the ADA's findings that it desired to address discrimination against the disabled by affording "an opportunity to compete on an equal basis," 42 U.S.C. § 12101(a)(9). The position of the court below and the Enforcement Guidance would stand the statutory purpose on its head, and therefore must give way. *See Sutton v. United Air*

Lines, Inc., 527 U.S. 471, 484-87 (1999) (rejecting position in EEOC Guidance based principally on inconsistency with ADA finding); *id.* at 494 (Ginsburg, J., concurring).

3. The ADA's legislative history does not change the analysis.

The Ninth Circuit below also relied on a two-sentence passage in the legislative history. *See* Pet. App. 24a.[9] But because, "[l]ooking at the Act as a whole," the terms of "the ADA cannot be read in [the] manner" proposed by respondent, there simply is "no reason to consider the ADA's legislative history." *Sutton*, 527 U.S. at 482; *see Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1311 (2001); *Ratzlaf*

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[9] The passage appears in a discussion of the treatment of collective bargaining agreements under the Act, and is highlighted below:

> An employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this legislation.
>
> The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. *For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job.*
>
> In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business criteria. . . .

S. Rep. 101-116, at 32 (emphasis added). The House Report contains essentially the same language, except that it adds the following sentence after the highlighted portion: "However, the agreement would not be determinative on the issue." H.R. Rep. No. 101-485 (II), at 63.

v. United States, 510 U.S. 135, 147-48 (1994).

In any event, the brief reference in the legislative history cited by the court below is not illuminating. It appears in the course of a discussion designed to make a different point, *i.e.*, that collective bargaining agreements are not insulated from review under the Act. The particular example suggests that a provision in a collective bargaining agreement reserving a specific position for employees with a given level of seniority would be "a factor" in assessing whether reassignment of a disabled employee lacking the requisite seniority to the position is a reasonable accommodation. *See* S. Rep. No. 101-116, at 32; H.R. Rep. No. 101-485 (II), at 63. In the Ninth Circuit's view, the example confirms that the reassignment provision must mean more than an opportunity to compete for positions on an equal basis, because otherwise the collective bargaining agreement's seniority requirement would be conclusive (and not merely a factor) in the reasonableness inquiry. *See* Pet. App. 24a.

The example is not analogous to this case, however, which involves seniority rules defining the *relative* rights and priorities of employees to bid for positions, not a job description reserving a particular position for employees with a specific level of experience with the company. Fixed job criteria of that sort are always subject to disparate impact review under the ADA (and other employment discrimination laws) for their legitimacy. *See Eckles v. Consolidated Rail. Corp.*, 94 F.3d 1041, 1049-50 (7th Cir. 1996). What is more, whatever minimal weight the passing discussion in the example might command as applied to the circumstances of this case, it is substantially outweighed by the consistent message expressed throughout the legislative history that the statute – including the reasonable accommodation standard – requires equal, but not preferential, treatment. *See* H.R. Rep. No. 101-485 (II), at 66 ("The Committee believes strongly that a reasonable accommodation should provide a meaningful *equal* employment opportunity. Meaningful equal employment opportunity means an opportunity to attain the *same* level of performance as is available to nondisabled employees having similar skills and abilities.") (emphasis added); S. Rep. No. 101-116, at 35 (same statement). *See also* H.R. Rep. No. 101-485(II), at 56 ("the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability"); S. Rep. No. 101-116, at 26-27 (same statement). The distinction between equal and preferential treatment was carried forward in the statute, and it is dispositive here.

C. Respondent's Requested Accommodation Is Not Reasonable Because It Would Displace Legitimate Expectations Under A Seniority Policy.

Even assuming disabled employees are entitled to preferential treatment in reassignment as a general matter, the particular type of preference sought by respondent in this case cannot constitute a reasonable accommodation. As this Court has held in construing the parallel standard under Title VII, and as was the uniformly accepted rule under the matching requirement in the Rehabilitation Act's regulations at the time of the ADA's enactment, the ADA's reasonable accommodation standard does not require reassignment in violation of the legitimate expectations of other employees under an established seniority policy.

Seniority systems are of "overriding importance" in the national economy, and "seniority plays a central role in allocating benefits and burdens among employees." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 239-40 (1982); *see Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 766 (1976). While seniority policies first became prevalent in collective bargaining agreements, they have long been a fixed element of the nonunion workplace as well. *See Supreme Court 1982 Term, Labor Law,* 97 Harv. L. Rev. 269, 272 n.19 (1983) ("Because of its advantages to workers and businesses alike,

seniority has become a ubiquitous feature of both unionized and nonunionized workplaces.").[10] Seniority rules benefit both the employer and employee: the employer, by promoting long-term retention and affording a straightforward and evenhanded means of resolving employment issues; and the employee, by providing job security and an opportunity for steady and predictable advancement based on objective standards. *See* Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 57-58.

The very purpose and nature of a seniority system thus is to engender expectations and reliance interests in employees. As a result, any disruption of seniority rights – particularly where less senior employees leapfrog over more senior employees – entails significant adverse consequences for employment relations, including "deterioration in morale, labor unrest, and reduced productivity." *Ford Motor Co.*, 458 U.S. at 229. The implications of displacing seniority rules are particularly severe where, as in this case, those rules are used to determine the relative rights of employees in the context of layoffs. *See* I Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 72 (3d ed. 1996) ("One of the most important aspects of competitive seniority is its use in determining who will be laid off during a reduction in force."); *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) (plurality opinion); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). Layoff circumstances by nature involve a zero-sum situation, in which an override of seniority rules can result in the loss of a job by a more senior employee despite his entitlement under an established seniority policy to remain with the company.

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[10] Seniority is an entrenched element of employment relations in the airline industry in particular, in both union and nonunion settings. *See* Brief of Amici Curiae Air Transp. Ass'n et al., *US Airways, Inc. v. Barnett*, No. 00-1250.

1. Judicial interpretations of analogous reasonable accommodation standards establish that employers are not required to violate a seniority policy.

The legitimate employee expectations and reliance interests associated with seniority policies are well-recognized in the law. Of particular relevance here, the established rule under the analogous "reasonable accommodation" requirements in two pre-ADA employment discrimination statutes – Title VII, 42 U.S.C. §§ 2000e *et seq.*, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 – was that employers were not required to make reassignments in violation of a bona fide and established seniority policy.

a. Title VII's reasonable accommodation standard concerns discrimination on the basis of religion. Like the analogous provision in the ADA, Title VII requires an employer "to reasonably accommodate to" an employee's "religious observance or practice" unless the accommodation would work an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

This Court interpreted that provision in the context of seniority rights in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). *Hardison* involved a seniority policy in a collective bargaining agreement under which the most senior employees were given first choice for job and shift assignments. *Id.* at 67. The plaintiff's religious beliefs prevented him from working on Saturdays, but he had insufficient seniority to avoid the Saturday shift. He therefore sought an exception from the seniority rules under Title VII's reasonable accommodation standard. *Id.* at 67-69.

This Court determined that the reasonable accommodation standard did not require displacing the rights of more senior employees to avoid the Saturday shift. "Without a clear and express indication from Congress," the Court explained, it could not find "that an agreed-upon seniority system must give way when necessary to accommodate reli-

gious observances." *Id.* at 79. In the Court's view, "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.* at 81.

It is true that Title VII contains a specific provision exempting "bona fide seniority" systems from the statute's disparate impact prohibition, *see* 42 U.S.C. § 2000e-2(h), and that the opinion in *Hardison* invoked that provision. But the Court only turned to that provision after having already concluded that the reasonable accommodation standard did not require supplanting seniority rights; and the Court made clear that its "conclusion" to that effect was merely "supported by" – and not determined by – the terms of § 2000e-2(h). 432 U.S. at 81; *see Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1049 n.13 (7th Cir. 1996). It is also true that Congress refused to incorporate into the ADA a separate aspect of *Hardison – viz.*, the later discussion in the opinion holding that the "undue hardship" standard in Title VII only requires showing a "*de minimis* cost," 432 U.S. at 84 – by specifying in the text of the ADA that "undue hardship" requires demonstrating "*significant* difficulty or expense." 42 U.S.C. § 12111(10)(A) (emphasis added); *see* H.R. Rep. No. 101-485 (II), at 68. *See also Eckles*, 94 F.3d at 1049 n.12.

But Congress gave no similar indication in the ADA of disagreement with the conclusion in *Hardison* of more salience here: that the "reasonable accommodation" standard does not require an "employer [to] deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the . . . needs of others." 432 U.S. at 81. *See also id.* at 79 n.12 ("strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in

order to accommodate the religious needs of others").

The congressional silence on that issue speaks volumes. As this Court has explained in the specific context of the ADA: "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Incorporating *Hardison*'s interpretation of "reasonable accommodation" into the terms of the ADA compels the conclusion that the ADA's analogous standard likewise does not require displacing the rights of more senior employees under the terms of an established seniority policy.

b. Any remaining uncertainty on the issue after *Hardison* disappears upon consideration of cases construing the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act prohibits discrimination against the disabled in federally funded programs. *See* 29 U.S.C. § 794. Since well before the ADA's enactment, the regulations implementing § 504 of the Rehabilitation Act have contained a reasonable accommodation requirement virtually identical to the one now in the ADA. *See, e.g.*, 45 C.F.R. § 84.12(a) (1990) (requiring recipients of federal funds to "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate . . . undue hardship"). In fact, Congress specifically identified the reasonable accommodation requirement in the Rehabilitation Act regulations as the source of the parallel provision in the ADA.[11]

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[11] *See* H.R. Rep. No. 101-485(II), at 23 ("The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business."); *id.* at 62, 67.

And Congress's "repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon*, 524 U.S. at 631; *see id.* at 638 ("the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act").

The "pre-existing" interpretations of the Rehabilitation Act's reasonable accommodation standard are telling. Prior to the ADA's enactment, a number of courts faced accommodation claims under the Rehabilitation Act seeking reassignment in conflict with established seniority rules. Those courts were "unanimous in rejecting the claim that 'reasonable accommodation' under the Rehabilitation Act requires reassignment of a disabled employee in violation of a bona fide seniority system." *Eckles*, 94 F.3d at 1047 (citing *Shea v. Tisch*, 870 F.2d 786, 789-90 (1st Cir. 1989) (per curiam); *Carter v. Tisch*, 822 F.2d 465, 467-79 (4th Cir. 1987); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1251-52 (6th Cir. 1985); *Daubert v. United States Postal Serv.*, 733 F.2d 1367, 1370 (10th Cir. 1984)); *see Davis v. United States Postal Serv.*, 675 F. Supp. 225, 235 (M.D. Pa. 1987); *Hurst v. United States Postal Serv.*, 653 F. Supp. 259, 261-63 (N.D. Ga. 1986); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982). Significantly, the courts arrived at that conclusion even though the Rehabilitation Act – unlike Title VII – contains no language expressly limiting the extent to which its prohibitions reach bona fide seniority policies.

The accepted rule under the Rehabilitation Act controls this case.[12] Not only is Congress presumed to have intended

[12] This Court stated with respect to the Rehabilitation Act's reasonable accommodation requirement that, "[a]lthough [employers] are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987). That statement supports the decisions involving seniority systems, because a position reserved for a more senior employee under an established seniority policy would not represent an "alternative employment opportunit[y] reasonably *available* under the employer's *existing policies*." *Id.* (emphasis added).

to incorporate into the ADA the settled judicial interpretation of the Rehabilitation Act, *see Bragdon*, 524 U.S. at 645, but Congress drove the point home in the text of the ADA by specifying that employers are required to consider reassignment only "to a vacant position." 42 U.S.C. § 12111(9). A position that more senior employees are entitled to obtain under a seniority policy is not "vacant" to a junior employee, as the latter cannot even be considered for the position unless (and until) more senior employees decide to forego it. *See Willis v. Pacific Mar. Ass'n*, 244 F.3d 675, 681 (9th Cir. 2001); *Eckles*, 94 F.3d at 1047 ("under a seniority system," "few positions are every truly 'vacant,' in the sense of being unfilled," and "[w]ithin such a framework a 'vacant position' would essentially be one that an employee could acquire with his seniority and for which he could meet the job requirements"). A "vacant position" thus is not just one without a physical occupant, but is one that is also without a superseding entitlement under a seniority policy. Indeed, advancing a disabled employee past other employees in a seniority queue is tantamount both to "bumping" those employees and to promoting the disabled employee, *see EEOC v. Humiston-Keeling*, 227 F.3d 1024, 1029 (7th Cir. 2000), neither of which falls within the compass of the reassignment provision. *See supra* at 23-24.[13]

[13] There is no meaningful distinction between an individual who has occupied a position for a very short time and an individual who is entitled to occupy the position within a very short time – both are "bumped" by a displacement of their entitlement to hold the position. Respondent's Brief in Opposition to the Petition for Certiorari ("Opp."), in fact, acknowledges that "disabled employees who seek reassignment into a position, but who are not next in line for the job under the union contract, are in effect asking to 'bump' other employees who are contractually entitled

In any event, even assuming that a position reserved for a more senior employee could be considered "vacant," the fact that the ADA contemplates reassignment only "to a vacant position" confirms Congress's intention to avoid interfering with the legitimate and settled expectations of other employees. That language thereby serves at the very least to reinforce the presumption that Congress intended to incorporate into the ADA's terms the Rehabilitation Act decisions holding that employers need not supplant an employee's entitlement to a position under an established seniority system. *See Bragdon*, 524 U.S. at 645. With the exception of the Ninth Circuit's opinion below, in fact, every court of appeals to address the question has found that the established rule under the Rehabilitation Act applies equally under the ADA, and that employers therefore need not reassign a disabled employee in violation of a bona fide seniority policy. *See Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000) (citing cases), *cert. denied*, 121 S. Ct. 304 (2000).

2. There is no material distinction under the statute between collectively bargained and employer implemented seniority policies.

Respondent submits that the same result should not obtain in this case because US Airways' seniority policy is not part of a collective bargaining agreement. *See* Opp. at 13-14. There is no basis in the ADA for drawing any such distinction, however. *See EEOC v. Sara Lee Corp.*, 237 F.3d 349,

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to the position." Opp. at 14. And "[b]ecause a reasonable accommodation can not bump another, nondisabled employee, this type of transfer is not permitted." *Id.* Although that discussion specifically addresses seniority rules contained in collective bargaining agreements, the distinction can have no bearing on the question whether bypassing other employees in a seniority system – whether collectively bargained or not – amounts to a "bump." More generally, the distinction between collectively bargained and employer initiated seniority policies does not affect the resolution of this case. *See infra* § II.C.2.

355 (4th Cir. 2001); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997).

The ADA, like other employment discrimination statutes, does not exempt the terms of collective bargaining agreements from its reach.[14] To the contrary, the statute specifically lists a "labor organization" as one type of "covered entity" subject to its provisions. 42 U.S.C. § 12111(2). More importantly, the statutory definition of "discrimination" includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified individual with a disability to the discrimination prohibited by this" statute, and emphasizes that "such relationship includes a *relationship with . . . [a] labor union*." *Id.* § 12112(b)(2) (emphasis added); *see* 29 C.F.R. § 1630.6 (stating that phrase "contractual or other arrangement or relationship" in the statute encompasses relationship with "labor union, including *collective bargaining agreements*") (emphasis added).

Congress thereby put in the terms of the Act what should be intuitively apparent: that parties, including parties to a collective bargaining agreement, are not free to contract their way out of the ADA's prohibitions. *See* S. Rep. No. 101-116, at 32 ("An employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation."); H.R. Rep. No. 101-485 (II), at 63 (same statement). The terms of the statute thus dispose of the Ninth Circuit's suggestion below that the analysis under the ADA might vary with whether "bargained for rights are involved." Pet. App. 26a. Because the ADA's

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[14] Conversely, where a statute like Title VII contains a specific exception for the operation of bona fide seniority systems, *see* 42 U.S.C. § 2000e-2(h), the exception covers both collectively bargained and employer-initiated seniority policies. *See Williams v. New Orleans Steamship Ass'n*, 673 F.2d 742, 754 n.19 (5th Cir. 1982); *EEOC v. E.I. DuPont de Nemours & Co.*, 445 F. Supp. 223, 248-49 (D. Del. 1978).

prohibitions apply with full force to the provisions of collective bargaining agreements, the presence or absence of "bargained for rights" can make no difference to the analysis.[15]

The presence or absence of "bargained for rights" would not affect the analysis even if the statute did not directly resolve the question. To begin with, employment policies are often determined to give rise to contract rights even when not the product of collective bargaining.[16] Several courts have found employer-initiated seniority policies in particular to create contract rights. *See DeMasse v. ITT Corp.*, 111 F.3d 730, 731 (9th Cir. 1997) (applying Arizona law); *Crain Indus. v. Cass*, 810 S.W.2d 910, 913 (Ark. 1991); *Ex parte Amoco Fabrics & Fibers Co.*, 729 So.2d 336, 337 (Ala. 1998); *Williams v. Maremont Corp.*, 776 S.W.2d 78, 79, 81 (Tenn. Ct. App. 1988). As a result, an employer who makes an exception to an established seniority policy faces the risk of a lawsuit by the displaced employee whether the policy is collectively bargained or not.

More significantly, the likelihood that the displaced employee in fact would prevail in a contract claim under the terms of a particular seniority policy is not the central issue. The reason that employers need not interfere with an estab-

[15] It bears noting in this regard that, where a seniority system is part of a collective bargaining agreement, the employees themselves do not possess contract rights. It instead is the union – as the party to the contract – that is entitled to enforce the contract. Accordingly, the union and company can alter the operation of a seniority system by amending the terms of the collective bargaining agreement, and an employee adversely affected by the change in seniority rules ordinarily would have no recourse in that event (unless the union acted in bad faith). *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

[16] *See Sara Lee Corp.*, 237 F.3d at 355; 1 Stephen P. Pepe & Scott H. Dunham, *Avoiding and Defending Wrongful Discharge Claims* § 2:23 (2000) ("The majority view is that employee handbooks and personnel manuals can . . . form a binding employment contract either as an implied or express promise.") (citing decisions from 40 states).

lished seniority policy under the statute is that it would upset the legitimate expectations of employees, and those expectations are fully ingrained where a longstanding seniority system is employer-implemented rather than collectively bargained. *See EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. 223, 249 (D. Del. 1978) ("[t]hat a current employee expects to have certain seniority rights because of a plan adopted at the employer's initiative, as opposed to a plan negotiated between labor and management, in no way diminishes that employee's expectations"). That is evidenced by the fact that "heavy reliance on the seniority principle . . . pervades nonunion employment as well." Paul C. Weiler, *Governing the Workplace* 66 (1990); *see supra* at 31-32. Indeed, because an employer that ignores the terms of its own seniority policy gives fuel to a potential union campaign, employers that wish to maintain a union-free workplace have an added incentive to observe carefully the rules of seniority policies that they put in place.

For those reasons, the rights conferred by the ADA in disabled employees do not vary depending on whether an employee is a member of a union, and the obligations imposed on employers do not vary depending on whether the workplace is unionized. The central question under the ADA's reasonable accommodation standard thus is not whether the employment policy at issue arises out of a collective bargaining agreement. The question instead is whether the refusal to make an exception to the terms of the policy – whatever their source – constitutes a failure to make reasonable accommodation. The answer in this case is clear. Under the settled rule in the Rehabilitation Act cases, and under this Court's decision in *Hardison*, employers are not required to displace the legitimate expectations of employees under an established seniority policy, whether it is collectively bargained or not.

III. REQUIRING AN EMPLOYER TO OVERRIDE THE TERMS OF AN ESTABLISHED SENIORITY POLICY WOULD IMPOSE AN UNDUE HARDSHIP ON THE EMPLOYER'S OPERATIONS.

Although we believe that respondent's and the EEOC's position concerning the relative burdens faced by an employee and employer in a reasonable accommodation claim is in error, *see supra* § II.A, adopting their view would in no way determine the outcome of this case. Even if an employee needs only to demonstrate that a requested accommodation would be "effective," the consequences of the accommodation on the employer's operations would still enter into the analysis as part of the employer's effort to prove "undue hardship." In particular, the employer would have the opportunity to establish that the accommodation would impose "significant difficulty or expense" when considered in light of the several factors enumerated in the statute, including "the impact" of the accommodation "upon the operation of the facility." 42 U.S.C. § 12111(10).

For the same reasons that the accommodation sought by respondent is not a "reasonable" one under our understanding of the parties' relative burdens, it would work an "undue hardship" under respondent's understanding of the parties' relative burdens. The undue hardship inquiry takes into account not just the financial costs of the accommodation to the employer, but also the non-monetary implications of the accommodation for employment relations. *See* 29 C.F.R. § 1630.2(p)(2)(v); *id.* pt. 1630 app. § 1630.2(p) ("concept of undue hardship is not limited to financial difficulty," but also "refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive"). Significantly, the analysis would encompass an assessment of whether "the provision of a particular accommodation would be unduly disruptive to . . . *other employees* or to the functioning of [the employer's] business." *Id.* pt. 1630 app. § 1630.15(d)

(emphasis added).

An accommodation that disrupts the settled and legitimate expectations of "other employees" under a longstanding seniority policy would impose an undue hardship. *See supra* § II.C. Indeed, whether this Court's decision in *Hardison* and the uniform judicial interpretations of the regulations implementing § 504 of the Rehabilitation Act are considered to fall within the "reasonable accommodation" or "undue hardship" prongs of the inquiry, the outcome remains the same: Congress is assumed to have incorporated those interpretations into the ADA's reasonable accommodation requirement, with the result that employers are not obligated to reassign a disabled employee to a position in violation of a bona fide and established seniority policy.

The Ninth Circuit below, relying on the EEOC's Enforcement Guidance, took the position that displacing the rights and expectations of more senior employees under a seniority policy would not always work an undue hardship, and that a "case-by-case fact intensive analysis" of the question thus was necessary. Pet. App. 27a; *see* Enforcement Guidance 5463 n.115. That view is insupportable. First, it cannot be squared with the decisions adopting a clear rule under the Rehabilitation Act. Second, an employer faced with the prospect of having to prove undue hardship in a "case-by-case fact intensive analysis" would likely choose to avoid the risk by granting an exception to the operation of seniority rules; and that would encourage an increasing number of similar accommodation requests, eventually compromising the integrity of the seniority system.

Finally, the "case-by-case fact intensive analysis" proposed by the Ninth Circuit cannot be squared with Congress's purposes in the Act. Congress specified in the text of the statute that it was "the purpose of" the ADA "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42

U.S.C. § 12101(b)(2). The open-ended and indefinite framework suggested by the Ninth Circuit is incompatible with those objectives. This Court instead should embrace the "clear," "consistent," and "enforceable" rule that was adopted by courts construing the Rehabilitation Act regulations, and that better coheres with Congress's intent to promote competition on an equal basis: Employers are not required to reassign a disabled employee to a position when other employees are entitled to the position under a bona fide and established seniority policy. At the very least, an employer should be able to apply its seniority rules free of uncertainty and the threat of litigation in the particular circumstances of this case, which involve an established and longstanding seniority policy and the special context of layoffs.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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